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No. 27

In the Supreme Court of the United States

October Term, 1944.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, *Petitioner,*

vs.

HELMERICH & PAYNE, INC., *Respondent.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

BRIEF of RESPONDENT.

FRANK SETTLE,
EUGENE O. MONNET,
SAM CLAMMER,
918 Philtower,
Tulsa, Oklahoma,
Attorneys for Respondent.

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IN THE SUPREME COURT OF THE UNITED STATES.

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vs.

HELMERICH & PAYNE, INC., *Respondent.*

BRIEF *for the* RESPONDENT.

Statement.

This action involves the validity (under the Fair Labor Standards Act) of a certain employment contract (R. 76) of respondent, a drilling contractor and oil producer. Petitioner, the Administrator of the Wage and Hour Division of the United States Department of Labor, seeks to enjoin respondent's use of this contract, which was abandoned on and has not been used since July 16, 1941 (R. 10 and 19), two months after suit was filed in the lower court and long prior to the judgment of that court. The lower court found the contract complied with the Act, and on December 4, 1942, rendered judgment denying the injunction (R. 83). Petitioner appealed to the United States Circuit Court of Appeals for the Tenth Circuit, which court affirmed said judgment on November 15, 1943.

Prior to the effective date of said Fair Labor Standards Act (October 24, 1938) respondent, like most other employers in the oil industry, was paying wages far in excess of the required minimum rate under the Act. For instance, it was paying its rotary drillers $11.00 an eight hour day or tour, and its rotary helpers $7.00 for the same period. Consequently, upon passage of the Act, respondent was not confronted with the necessity of raising its wages to conform thereunto, but merely in changing its employment agreements to conform with the meaning and purpose of this new, unusual and then uninterpreted Act.

> *Its main purpose in formulating a new employment agreement was to permit, as far as possible, the payment of the same weekly wage after the Act as before;*

and this to enable its employees to have the same regular weekly income as they had before passage of the Act. Respondent decided that this new contract should provide for payment to its employees of the base or regular hourly rate for one half of the hours worked in each work week (not to exceed the maximum required by the Act); and of the overtime rate (one and one-half times base rate) for the remaining one-half of said work time in each work week. Upon this basis regular hourly rates were determined, which would insure to its employees at least the same weekly wage they had been receiving before the Act became effective. Forms were printed on this new contract, which was then signed in triplicate by the respondent (employer) and each of its field employees, who each received an executed copy thereof.

This contract, which petitioner chooses to call "Split Day Plan Contract," but which we believe would be more

appropriate to term "Split Week Plan Contract" contained the following provisions, to-wit:

1. Provided for a specific fixed and stated regular or base hourly rate of pay, which was far in excess of the statutory minimum, being $1.10 per hour in case of a rotary driller, seventy cents per hour in case of a rotary helper, $1.00 per hour in case of a cable tool driller, and eighty cents per hour in case of a tool-dresser;

2. Provided for payment of the regular or base hourly rate for the first four hours in every work day or eight hour tour, and one and one-half times said regular or base hourly rate for the last four hours in each said tour;

3. Provided that the regular or base hourly rate should never apply to more than forty hours in any work week;

4. Provided that as to lease pumpers, truck drivers and swampers, that in event employee's pay for any bi-weekly period was less than a stipulated amount, that employer would advance said employee the difference, which shall apply on future overtime payments; adjustment to be made on January 1st of each year and when said employment ceases; and

5. Provided that employee should make daily reports to the Home Office of all his work time.

ARGUMENT.

The order of this court allowing the writ of *certiorari* (R. 121) specifically requested counsel "to discuss in their briefs and oral argument the question of whether the case is moot." This, therefore, raises two main issues to be considered on this appeal, namely:

First: *Is this a moot case, which should be dismissed;* and

Second: *Was said employment contract of the respondent in violation of Section 7 of the Fair Labor Standards Act.*

These questions will be hereinafter discussed in the order above set forth, which is in the same order used by petitioner in its brief.

I.

Is This a Moot Action, Which Should Be Dismissed?

This injunction action was filed in the lower court on May 3, 1941. Respondent voluntarily abandoned the employment contract complained of on July 16, 1941, less than 2½ months thereafter. The record is silent as to the reason for this abandonment, although, as a matter of fact, it was done because of an arrangement (initiated by respondent) between the American Association of Oil Well Drilling Contractors (of which respondent was a member) and Philip B. Fleming, Administrator of the Wage and Hour Division of the Department of Labor, by which the members of said association signified their intention to abandon the use of employment contracts similar to the one in issue. The record further shows that respondent successfully maintained the validity of this contract through the lower court and Circuit Court of Appeals. This court will take judicial notice of the fact that under the Federal Anti-Inflation Act and the President's Executive Order effectuating the same, respondent could not now change its present employment contracts and go back to the use of the contract under attack without the approval of the War Labor Board.

Under Article 3, Section 2 of the Federal Constitution, Federal courts have jurisdiction to hear and determine "cases and controversies" only. A moot question does not present a "case" or "controversy" and, consequently, being a jurisdictional question, the power of the court to hear and determine a moot case cannot be conferred thereon by waiver or consent of the parties.

See *People of the State of California* v. *San Pablo & T. R. Co.*, (1893) 149 U. S. 308, 13 Sup. Ct. Rep. 876; *United States* v. *Hamburg-American Co.*, (1916) 239 U. S. 466, 36 Sup. Ct. Rep. 212, wherein it was stated:

> "No stipulation of the parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty of the court in this regard."

This court has held that:

> "It is a settled principle in this court that it will determine only actual matters in controversy essential to the decision of the particular case before it. Where, by an act of the parties or subsequent law the existing controversy has come to an end, the case becomes moot and should be treated accordingly. However convenient it might be to have decided the question of the power of the Commission to require the carriers to comply with an order prescribing bills of lading, this court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law that cannot affect the result as to the thing in issue in the case before it."
>
> *United States* v. *Alaska S. S. Co.*, (1920) 253 U. S. 113, 40 Sup. Ct. Rep. 448 at 449.

See also *United States* v. *Hamburg-American Co.*, (1916) 239 U. S. 466, 36 Sup. Ct. Rep. 212; and *People of the State*

of California v. San Pablo & T. R. Co., (1893) 149 U. S. 308, 13 Sup. Ct. Rep. 876; *Walling v. Shenandoah-Dives Mining Co.*, (C. C. A. 10, 1943) 134 F. (2d) 395; wherein the Circuit Court dismissed, as moot, an injunction suit under circumstances very similar to the case at bar.

It was the duty of the Administrator of the Wage and Hour Division of the Department of Labor to see that the Act was complied with and he was thereby specifically given the right to enjoin its violation. When violations of this Act cease, either because of warnings from the Administrator, or injunctions secured by him, his duty has been performed. In this case respondent ceased the alleged violation shortly after suit was filed and long before trial. At the time of trial and judgment of the lower court it was neither doing nor threatening to do any act in violation of the statute.

An analysis of petitioner's brief discloses the following grounds to support its contention that this case is not moot and is still a controversy, to-wit:

First, Administrator's desire and need for a judicial construction of this type of contract;

Second, Lack of affirmative showing that respondent would not again use the abandoned employment contract; and

Third, Respondent's successful maintainance of the legality of said contract in the two courts below.

In support of this contention it cites:

Hecht Co. v. Bowles, (1944) 321 U. S. 321, 64 Sup. Ct. Rep. 587;

J. I. Case Co. v. Natl. Labor Relations Board, (1944) 321 U. S. 332, 64 Sup. Ct. Rep. 576;

Federal Trade Commission v. Goodyear Tire &

Rubber Co., (1938) 304 U. S. 257, 58 Sup. Ct. Rep. 863;

National Labor Relations Board v. *Pennsylvania Greyhound Lines, Inc.*, (1938) 303 U. S. 261, 58 Sup. Ct. Rep. 571;

United States v. *Trans Missouri Freight Asso.*, (1897) 166 U. S. 290, 17 Sup. Ct. Rep. 540;

all of which cases are determined either by special statutes, involve the validity of then present, existing desist orders, or seek to enjoin actually threatened unlawful acts; and do not, in our opinion, sustain petitioner's contention. The *Hecht* case was determined by special section of the Emergency Price Control Act of 1942, which specifically gives the Price Administrator the right to enjoin violations of that Act upon a showing that any person has violated the same regardless of subsequent cessation of said violation; the *J. I. Case Company* case involved the validity of then present, existing desist order of the National Labor Relations Board; the *Federal Trade Commission* v. *Goodyear* case also involved the validity of a then present, existing desist order of the Federal Trade Commission, which the court held was none the less effective and existent, though subsequently complied with; the *National Labor Relations Board* v. *Pa. Greyhound* case also involved the validity of a then present, existing desist order of the National Labor Relations Board, which, in the following language was held to still be an active order, though obeyed:

> "That an order of the character made by the Board, lawful when made, does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made."

In other words, an injunction is not dissolved by complying with it.

The *United States v. Trans-Missouri Freight Association* case was a case wherein the government sought to dissolve an association of railroad companies and enjoin their compliance with the contract of association, alleged to be in violation of the Anti Trust Act. The lower court refused to grant the injunction upholding the association contract and the government appealed to the Circuit Court. Between the lower court's judgment and the decision of the Circuit Court, the railroads voluntarily dissolved the association and the contract creating it, but almost immediately thereafter entered into a new and similar association contract. The Circuit Court affirmed the judgment of the lower court and the government appealed to this court. Whereupon, the defendant moved to dismiss the appeal on the grounds the case was moot, setting forth the fact of the dissolution of the association and the association contract. The government filed counter affidavits, showing that while the association had been dissolved, another similar association had been formed almost immediately thereafter, thereby affirmatively showing that defendants intended and did continue their alleged wrongful acts. This court held the case was not moot and denied the motion to dismiss, but indicated by its decision that same was an exception to the general rule determining moot cases, and further indicated by the following language that its decision should only be used as a precedent in governing similar situations, to-wit:

> "Although the general rule is that equity does not interfere simply to restrain future violation of the law; yet when parties have entered into an illegal agreement and are acting under it, and when there is no adequate remedy at law and the jurisdiction of the court has attached by the filing of a bill to restrain such, or any like action under a similar agreement and a trial has been had, and judgment entered, the appellate juris-

diction of this court is not ousted by a simple dissolution of the association, effected subsequently to the entry of judgment in the suit."

When the lower court rendered judgment in the case at bar, respondent was neither doing nor threatening to do the act sought to be enjoined. If the desire and need of the Administrator to secure a decision of this court on the legality of the contract in question is, itself, a legal reason for keeping a dead case alive; then this case is not moot. Otherwise we respectfully submit that it is now a dead action and should be dismissed.

II.

Was Said Employment Contract of Respondent in Violation of Section 7 of the Fair Labor Standards Act?

This court has recently held in the case of *Walling* v. *Belo Corporation*, (1942) 316 U. S. 624, 62 Sup. Ct. Rep. 1223:

1. The Act does not prohibit employment contracts which pay employees the same weekly wages they received previous thereunto, so long as rates under the new contract equal or exceed the minimum required by the Act;

2. Employer and employee may, by contract, establish the "regular rate" of hourly pay;

3. The Act establishes minimum rates and maximum hours and contracts within those limitations comply with the Act; and

4. The Act does not prohibit a guaranty or loan plan of employment contract by which, in any given work week, employer advances or loans to employe an amount in excess of his pay based upon the regular rate for regular time and time and a half for overtime.

Employment contracts conform with the Act so long as

the base rate equals or exceeds thirty cents per hour and is not paid for more (not less) than forty hours in any work week, and so long as the overtime rate equals or exceeds one and one-half times the base rate and is paid, for not less than all work time in excess of forty hours in any work week. The employer and employee, by contract, can determine the base hourly rate. They may also, by contract, agree upon an arrangement as to rates, (base rates and overtime rates) which will substantially insure and pay the employe the same weekly wage he was receiving prior to the effective date of that Act. In the case at bar the base and overtime rates and weekly work time by which they were to be paid were so determined (within the minimum and maximum limitations of the Act) as would insure payment to the employe of the same regular weekly wage he was receiving before the Act became effective. The contract stipulated a definite, specific, regular base hourly wage far in excess of the statutory minimum; and that overtime should be paid on the basis of one and one-half times said regular rate. It further provided that said regular rate should be paid for one-half of all work time in each work week (not to exceed 40 hours, the maximum permitted by the Act) and that the remaining one-half of said weekly hours should be paid at one and one-half times said regular rate. Under this contract a rotary driller was to be paid on a base hourly rate of $1.10 per hour. On a 56 hour week he would be paid this base wage of $1.10 per hour for 28 hours, which is 12 hours less than the maximum permitted by the Act for payment of base rate; and would receive one and one-half times said rate, or $1.65 an hour, for the remaining 28 hours in said week, which is 12 hours more than the minimum permitted by the Act for payment of overtime rates. It is true that under this contract employee

was receiving the same regular weekly pay he was receiving prior to the Act, but such arrangement is permitted by the Act.

Petitioner makes the same contentions in this case as it made in the *Belo* case. It contends, in effect, that regardless of contract between employer and employee as to the agreed amount of regular hourly time and overtime rates, the regular hourly rates can only be determined by prorating the actual pay which employee receives for the first 40 hours he works in each work week; that the base pay must be paid for the first 40 hours in each work week and not for more, or not for less hours; and that the parties cannot establish the base or regular rate by agreement. This, of course, is contrary to this court's decision in the *Belo* case, in which it specifically held that the parties may, by contract, establish their base or regular rate, and that the Act established limitations only, consisting of minimum rates and maximum hours.

If the petitioner's contention is correct, an employer paying an employee $1.50 an hour before the Act went into effect, would not conform to the Act by thereafter agreeing to pay said employee $2.00 per hour as base hourly rate for the first 30 hours worked in each work week and one and one-half times said base rate, or $3.00 per hour for all hours worked thereafter in said work week; although the base rate was one-third higher than the former rate; the base time was paid for only seventy-five per cent of the maximum permitted by law; and the overtime was paid for ten hours more than the minimum limit of the Act.

Petitioner contends that this contract is not a bona fide contract. It was a written contract, signed by both the employer and employee, and the record contains no facts

which show (other than the contracts themselves) or tend to show that the parties were not bound thereby. Furthermore, the lower court has upheld said contract, and while it did not make a specific finding of fact that same was a bona fide contract, such finding should be presumed if same be necessary to upheld the lower court's decision. The Circuit Court of Appeals, in *Walling* v. *Helmerich & Payne, Inc.* (138 F. (2d) 705, at 706), made the following statement with regard to the bona fides of this contract, to-wit:

> "These contracts were actually entered into; there is no suggestion that the parties failed to understand them; there is no showing that the employees were overreached; and there is nothing in the record to indicate that any other element of fraud attended their execution. They expressly provide in clear and explicit language the regular rates per hour which exceed the minimum rates provided in the Act. Provide that such rates shall be paid for regular hours, which do not exceed the maximum provided in the Act, and provide for overtime at one and one-half times the regular rates for all excess time worked. The company and its employees mutually entered into the respective arrangements, and they do not contravene the exactions of the Act. *Walling* v. *A. H. Belo Corporation, supra.*"

We respectfully submit:

1. That this case is moot and should be dismissed; and

2. That if jurisdiction is retained, this court should find that the decision and judgment of the lower court should be affirmed.

Respectfully submitted,

FRANK SETTLE,
EUGENE O. MONNET,
SAM CLAMMER,
Attorneys for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 27.—October Term, 1944.

L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Petitioner,

vs.

Helmerich & Payne, Inc.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[November 6, 1944.]

Mr. Justice Murphy delivered the opinion of the Court.

We are concerned here with the question whether certain provisions of employment contracts relating to the computation and application of regular and overtime wage rates conform to the requirements of Section 7 (a) of the Fair Labor Standards Act of 1938, 52 Stat. 1060; 29 U. S. C. § 201 *et seq.*

Respondent is engaged in the production of oil and gas for interstate commerce and its employees admittedly are covered by the Act. Prior to October 24, 1938, the effective date of the Act, certain of respondent's employees worked eight, ten and twelve hour daily shifts, or "tours," and were paid a specified wage for each tour. These wages were in excess of the minimum required by the Act, though the number of tours per week would often cause an employee to work more than the maximum hours allowed by the Act without overtime pay being required.

In order to maintain the same wage levels after the Act became effective, respondent made new employment contracts with the employees in question whereby they received their wages under the so-called "Poxon" or split-day plan. This plan arbitrarily divided each regular tour into two parts for purposes of calculating and applying hourly wage rates. The first four hours of each eight hour tour, the first five hours of each ten hour tour and the first five hours of each twelve hour tour were assigned a specified hourly rate described as the "base or regular rate." The remaining hours in each tour were treated as "overtime" and

called for payment at one and one-half times the "base or regular rate." The contracts then recited that the "base rate" set forth "shall never apply to more than 40 hours in any work week."

These so-called "regular" and "overtime" hourly rates were calculated so as to insure that the total wages for each tour would continue the same as under the original contracts,[1] thereby avoiding the necessity of increasing wages or decreasing hours of work as the statutory maximum workweek of 40 hours became effective.[2] Only in the extremely unlikely case where an employee's tours totalled more than 80 hours in a week[3] did he become entitled to any pay in addition to the regular tour wages that he would have received prior to the adoption of the split-day plan. Until more than 80 hours had been worked the plan operated so that the employee could not be credited with more than 40 hours of "regular" work, the remaining time being denominated "overtime." Hence, since the wages under the old system and under the split-day plan were identical, the original tour rates could be used as the simple method of computing wages for each pay period. The actual and regular workweek was accordingly shorn of all significance.

The District Court and the Circuit Court of Appeals both held that the split-day plan of compensation, under the decision of this Court in *Walling* v. *Belo Corp.*, 316 U. S. 624, did not violate the provisions of Section 7 (a) of the Fair Labor Standards Act. We cannot agree.

Section 7 (a) limits to 40 a week the number of hours that an employer may employ any of his employees subject to the Act, unless the employee receives compensation for his employment in excess of 40 hours at a rate "not less than one and one-half times the regular rate at which he is employed." The split-day plan

[1] Thus the rotary helpers employed by respondent formerly received $7 for each eight hour tour. Under the split day plan, they received a "regular rate" of 70 cents an hour for the first four hours of each tour and an "overtime" rate of $1.05 for each of the remaining four hours. This totalled $7 for the tour.

[2] During the first year after the effective date of the Act the maximum was 44 hours; during the second year 42 hours; and thereafter 40 hours.

[3] For an employee working on twelve hour tours, it was necessary to work at least 96 hours per week before becoming entitled to increased wages under the split day plan.

here in issue satisfies neither the purpose nor the mechanics of this requirement.

As we pointed out in *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 577-578, the Congressional purpose in enacting Section 7 (a) was twofold: (1) to spread employment by placing financial pressure on the employer through the overtime pay requirement, see also *Southland Co.* v. *Bayley*, 319 U. S. 44, 48; and (2) to compensate employees for the burden of a workweek in excess of the hours fixed in the Act. Yet neither objective could be attained under the split-day plan. It enabled respondent to avoid paying real overtime wages for at least the first 40 hours worked in excess of the statutory maximum workweek, thus negativing any possible effect such a payment might have had upon the spreading of employment. And the plan was so designed as to deprive the employees of their statutory right to receive for all hours worked in excess of the first regular 40 hours one and one-half times the actual regular rate. The statutory maximum workweek of 40 hours was by contract twisted into an 80-hour maximum workweek. No plan so obviously inconsistent with the statutory purpose can lay a claim to legality.

The split-day plan, moreover, violated the basic rules for computing correctly the actual regular rate contemplated by Section 7 (a). While the words "regular rate" are not defined in the Act, they obviously mean the hourly rate actually paid for the normal, non-overtime workweek. *Overnight Motor Co.* v. *Missel*, *supra*. To compute this regular rate for respondent's employees, assuming the same wages and tours, required only the simple process of dividing the [redacted] that tour.[4] This regular rate was then applicable to the first 40 hours regularly worked on the tours and the overtime rate (150% of the regular rate) became effective as to all hours worked in excess of 40.

[4] In this case the weekly wage divided by the number of hours actually worked in the week would have yielded the same regular rate. Under either computation, a rotary helper being paid $7 for each eight hour tour was receiving 87½ cents per hour. This was his regular rate regardless of the number of tours per week. That rate was applicable to the first 40 hours regularly worked, or to the first five tours. For all hours in excess of 40, the rotary helper was entitled to one and one-half times that rate, or $1.31¼. We, of course, express no opinion as to the proper computation of the regular rate under other circumstances. Nor do we intend to indicate that the formula we have used as satisfying the statutory requirements is the only one which respondent could adopt as complying with them.

But respondent's plan made no effort to base the regular rate upon the wages actually received or upon the hours actually and regularly spent each week in working. Nor did it attempt to apply the regular rate to the first 40 hours actually and regularly worked. Instead the plan provided for a fictitious regular rate consisting of a figure somewhat lower than the rate actually received. This illusory rate was arbitrarily allocated to the first portion of each day's regular labor; the latter portion was designated "overtime" and called for compensation at a rate one and one-half times the fictitious regular rate. Thus when an employee on regular eight hour tours had actually worked 40 hours, respondent could point to the employee's contract and claim that he had worked only 20 "regular" hours and 20 "overtime" hours. Hence he was entitled to no additional remuneration for work in excess of 40 hours except in the unlikely situation, which never in fact occurred, of his actually working more than 80 hours. The vice of respondent's plan lay in the fact that the contract regular rate did not represent the rate which was actually paid for ordinary, non-overtime hours, nor did it allow extra compensation to be paid for true overtime hours. It was derived not from the actual hours and wages but from ingenious mathematical manipulations, with the sole purpose being to perpetuate the pre-statutory wage scale.[5]

It is no answer that the artificial regular rate was a product of contract or that it was in excess of the statutory minimum. The Act clearly contemplates the setting of the regular rate in a bona fide manner through wage negotiations between employer and employee, provided that the statutory minimum is respected. But this freedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes. Even when wages exceed the minimum prescribed by Congress, the parties to the contract must respect the statutory policy of requiring the employer to pay one and one-half times the regular hourly rate for all hours actually worked in excess of 40. Any other conclusion in this

[5] In paragraph 70.4 of Interpretative Bulletin No. 4, as revised in November, 1940, the Administrator expressed his opinion that a plan similar to that of respondent's did not conform to the Act. While this opinion is not binding on the administration of the Act, it does "carry persuasiveness as an expression of the view of those experienced in the administration of the Act and acting with the advice of a staff specializing in its interpretation and application." Overnight Motor Co. v. Missel, 316 U. S. 572, 580-581, n. 17.

case would exalt ingenuity over reality and would open the door to insidious disregard of the rights protected by the Act.

Nothing in this Court's decision in *Walling* v. *Belo Corp.*, *supra*, sanctions the use of the split-day plan. The controversy there centered about the question whether the regular rate should be computed from the guaranteed weekly wage or whether it should be identical with the hourly rate set forth in the employment contract. There was no question, as here, pertaining to the applicability of the regular rate to the first 40 hours actually and regularly worked, with the overtime rate applying to all hours worked in excess thereof.

One final point remains. Petitioner here filed a complaint in the District Court seeking, in part, an injunction to compel respondent to cease its use of the split-day contracts. Two months after the complaint was filed, but before the case came on for trial, respondent discontinued the use of these contracts and substituted different compensation plans not now before us. The District Court, however, denied the injunction on the merits insofar as the split-day contracts were concerned, and the court below affirmed on a like basis. 138 F. 2d 703. In granting certiorari upon the question of the legality of the split-day plan we asked for a discussion of the question whether respondent's discontinuance of the plan rendered the case moot. 321 U. S. 759. We hold that the case is not moot under these circumstances. Despite respondent's voluntary cessation of the challenged conduct, a controversy between the parties over the legality of the split-day plan still remains. Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power. *See Hecht Co.* v. *Bowles*, 321 U. S. 321, 327; *Otis & Co.* v. *Securities and Exchange Commission*, 106 F. 2d 579, 583-584. Respondent has consistently urged the validity of the split-day plan and would presumably be free to resume the use of this illegal plan were not some effective restraint made. There is thus "an actual controversy and adverse interests," *Lord* v. *Veazie*, 8 How. 251, 255, with a "subject-matter on which the judgment of the court can operate." *Ex parte Baez*, 177 U. S. 378, 390; *St Pierre* v. *United States*, 319 U. S. 41, 42.

We accordingly reverse the judgment of the court below with directions to remand the case to the District Court for further proceedings in conformity with this opinion.